RECORD
AND
BRIEFS

No. 17-532

In The
Supreme Court of the United States

CLAYVIN B. HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Petition For Writ Of Certiorari To The District Court Of Wyoming, Sheridan County

BRIEF OF THE CROW TRIBE OF INDIANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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The Crow Tribe of Indians respectfully submits this *amici curiae* brief in support of Petitioner.[1]

INTERESTS OF *AMICUS CURIAE*

Amicus Curiae the Crow Tribe of Indians ("Tribe")[2] is a sovereign, federally recognized Indian tribe with more than 14,000 members. More than 9,000 of those members reside on the Crow Indian Reservation ("Reservation"), which is located in southern Montana, adjacent to both the Northern Cheyenne Indian Reservation (to the east) and the State of Wyoming ("Respondent") (to the south). The Tribe is governed by the Crow Tribal General Council, consisting of all adult members of the Tribe, through a tripartite government with executive, legislative, and judicial branches. Const. and Bylaws of the Crow Tribe of Indians (hereinafter, "Crow Tribe Const."), art. I, *available at* http://www.crow-nsn.gov/constitutions-and-bylaws.html.

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[1] In accordance with Rule 37.2 of the Rules of the Supreme Court, counsel of record for all parties received timely notice of this brief and provided their written consent. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] The name of the Tribe, in its own language, is Apsaalooke. Apsaalooke and Crow are interchangeable and refer to the same indigenous tribal people and its federally recognized tribal government.

Clayvin B. Herrera ("Petitioner") is a member of the Tribe. This case arises from Petitioner's exercise of his off-reservation hunting rights, as expressly reserved by the Tribe in treaties negotiated with the United States, and reaffirmed in negotiated statutes enacted by Congress.

This case is of critical importance to the Tribe and its members. Some 150 years after the Fort Laramie Treaties were executed, subsistence hunting remains vital to the Tribe's members, who hunt both on the Reservation and off-reservation, including in the two national forests adjacent to the Reservation. The decision below, if upheld, would undermine the Tribe's treaty-guaranteed off-reservation hunting right in Wyoming, notwithstanding that Congress has never abrogated that right but instead has reaffirmed it. In so doing, the decision below would significantly curtail both the lands upon which the Tribe's members can hunt and the game available to them for their subsistence. It is imperative that this Court review, and reverse, the decision below.

SUMMARY OF ARGUMENT[3]

First, the decision below is in conflict with the State courts of last resort that have addressed an important question of purely Federal law – and upon

[3] *Amicus* fully support the reasons set forth by Petitioner for granting *certiorari* in this case, and offers the following additional analysis.

which the Ninth and Tenth Circuit Courts of Appeal are split – which should be decided by this Court: When a tribe has reserved by treaty the right to hunt on "unoccupied lands of the United States," may that tribe's members exercise that right on National Forest lands? At least nineteen tribes, in at least a dozen treaties, reserved for their members off-reservation hunting rights akin to the one at issue here, and all of those tribes are located near, if not adjacent to, National Forest lands. Scores of other tribes with off-reservation hunting rights also are located near or adjacent to National Forest lands. The status of Federally-guaranteed treaty hunting rights on Federal lands should not vary from State to State. This conflict is particularly problematic for *amicus*, whose Reservation borders National Forest lands in two different States that are on opposite sides of this legal issue.

Second, the decision below is inconsistent with a long line of decisions by this Court concerning Indian treaty abrogation and interpretation. This Court's opinion in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), reaffirmed what this Court has said in many cases: that if Congress is to abrogate a treaty right it "must clearly express its intent to do so. . . ." *Id.* at 202. Notwithstanding this Court's governing precedent, the decision below determined that the Tribe's off-reservation hunting right was abrogated without identifying any act of Congress that expressly did so. In addition, *Mille Lacs* reaffirms that treaty provisions must be interpreted as the Indians would have understood them. *Id.* at 196. The decision

below, however, uncritically accepts the proposition that the Treaty between the United States of America and the Crow Tribe of Indians, 15 Stat. 649 (1868) (hereinafter "1868 Treaty"), "clearly contemplated" that the Tribe's off-reservation hunting right would terminate upon the admission of Wyoming to the Union, but provides no evidence for this conclusion. To the contrary, historical evidence indicates that the Tribe's representatives at the treaty negotiations never would have interpreted the treaty as did the court below. The decision below relied exclusively on the holding in *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), notwithstanding that *Mille Lacs* markedly limited (if not outright repudiated) the case upon which *Repsis* relied, *Ward v. Race Horse*, 163 U.S. 504 (1896).

Amicus urges this Court to grant the Petition for Writ of Certiorari and reverse the judgment below.

HISTORICAL BACKGROUND

1. Prior to contact with non-Indians, the Crow were a nomadic people who depended on buffalo, elk, antelope, and deer for food, shelter, clothing, and many other uses. Frederick E. Hoxie, *The Crow* 24 (1989). The Tribe's traditional homelands around the period of initial contact with non-Indians encompassed an area that now comprises parts of Montana, Wyoming, and the Dakotas. *Montana v. United States*, 450 U.S. 544, 547 (1981); Treaty of Fort Laramie, 11 Stat. 749 (1851)

and 2 C. Kappler, Indian Affairs: Laws and Treaties 594 (1904) (hereinafter "1851 Treaty").[4]

2. "In the 19th century, warfare between the Crows and several other tribes led the tribes and the United States to sign the First Treaty of Fort Laramie of 1851, in which the signatory tribes acknowledged various designated lands as their respective territories." *Montana*, 450 U.S. at 547-48 (citing 1851 Treaty). In delineating their individual territories, however, the 1851 Treaty's signatory tribes "[did] not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." 1851 Treaty, art. 5, 2 C. Kappler 595.

3. The United States and the Tribe met again at Fort Laramie in 1867 to negotiate a treaty. *See generally Proceedings of the Great Peace Commission of 1867-1868* (Vine Deloria, Jr. and Raymond DeMallie eds. 1975) (hereinafter "*Proceedings*"). On November 12, 1867, Commissioner of Indian Affairs N.G. Taylor

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[4] The 1851 Treaty identified the Tribe's territory as follows:

> [C]ommencing at the mouth of the Powder River on the Yellowstone; thence up [the] Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek, and thence to its mouth.

1851 Treaty art. 5, 2 C. Kappler at 595.

explained to the Tribe's representatives the United States' purpose:

> We desire to set apart a tract of your country as a home for yourselves and your children forever, upon which your great Father will not permit the white man to trespass. We wish you to make out a section of country that will suit you for this purpose. When that is set apart, we desire to buy of you the right to use and settle the rest, *leaving to you, however, the right to hunt upon it as long as the game lasts.*

Id. at 86 (emphasis added). Three representatives of the Tribe, Bear's Tooth, Black Foot, and Wolf Bow, each expressed their desire for peace with the United States, but also the importance of maintaining their way of life, including the hunt. *See, e.g.*, *id.* at 88 (quoting Bear's Tooth: "You talk about farming for me and raising stock. I don't like to hear that. I was raised on game and I would like to live as I was raised. . . . We want to kill our own game and be glad. All of the Crows feel as I do."). The following day, Bear's Tooth told the treaty commissioners that he would bring the United States' offer to the Tribe. *Id.* at 91.

The following spring, the Tribe and the United States executed the 1868 Treaty, which set forth the boundaries of the Tribe's original Reservation on the southern border of the Montana Territory. 15 Stat. at 650 art. II. In that treaty, the Tribe reserved for itself "the right to hunt on the unoccupied lands of the United States so long as game may be found thereon,

and as long as peace subsists among the whites and Indians on the borders of the hunting districts." *Id.* at 650 art. IV.

4. Since the execution of the 1868 Treaty, the Tribe's members have exercised their right to hunt off their Reservation on unoccupied lands of the United States, including in the Bighorn National Forest. In 1989, Thomas L. Ten Bear, a Crow Tribal member, was cited by Wyoming State authorities for killing an elk in the Bighorn National Forest without a hunting license, and the United States Court of Appeals for the Tenth Circuit upheld his conviction. *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995). Relying on this Court's opinion in *Ward v. Race Horse*, 163 U.S. 504 (1896), the Tenth Circuit held that "[t]he Tribe's right to hunt reserved in the Treaty with the Crows, 1868, was repealed by the act admitting Wyoming to the Union." *Repsis*, 73 F.3d at 992. In the alternative, the Tenth Circuit held that, as a result of the creation of the Bighorn National Forest, that Forest's lands were no longer "unoccupied lands of the United States" upon which the Tribe's members could exercise their treaty-guaranteed off-reservation hunting right. *Id.* at 993.

The viability of *Repsis* was fatally undermined when this Court decided *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). In the face of Minnesota's reliance on *Repsis* (and *Race Horse*), in *Mille Lacs* this Court held that "*Race Horse* rested on a false premise," and that "Indian treaty rights can co-exist with state management of natural resources." *Id.* at 204. In light of *Mille Lacs* having repudiated *Race*

Horse (and, thus, the underpinnings of *Repsis*), the Tribe adopted a resolution declaring the policy of the Tribe to fully exercise the off-reservation hunting rights reserved by the 1868 Treaty, including in the Bighorn National Forest, and formally notified the States of Wyoming, Montana, and South Dakota of this policy. Crow Tribe Joint Action Resolution No. 13-09 (May 7, 2013).

5. As set forth in greater detail by Petitioner, *see* Pet.9-12, in January 2014 Petitioner and other members of the Tribe went hunting on the Reservation in order to provide food for their families and other tribal members. The group espied a small group of elk on the Reservation, followed it across the Montana-Wyoming state line into the Bighorn National Forest, killed, quartered, and packed three elk, and carried them back to the Reservation. Subsequently, Petitioner was cited for taking antlered big game during a closed-hunting season and for being an accessory to the same. Petitioner moved to dismiss on the grounds that his treaty-guaranteed off-reservation hunting right allowed him to hunt in the Bighorn National Forest. The Wyoming Circuit Court denied the motion, holding that it was "bound by" the Tenth Circuit's decision in *Repsis*, breathing life into a decision that had appeared dead for sixteen years. The Wyoming court concluded that this Court's opinion in *Mille Lacs* "had no effect on the *Repsis* decision," and barred Petitioner from asserting his treaty right at trial. Petitioner was convicted on both charges; he was fined $8,000 and given a one-year suspended jail sentence, and his hunting privileges were suspended for three years. In April

2017, a single judge on the Wyoming District Court, acting in an intermediate appellate capacity, affirmed the Wyoming Circuit Court. Petitioner timely appealed to the Wyoming Supreme Court, which denied review without explanation in a one-page order.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS BY STATE COURTS OF LAST RESORT AND WITH THE NINTH CIRCUIT ON AN IMPORTANT FEDERAL QUESTION: WHETHER NATIONAL FORESTS CONSTITUTE "UNOCCUPIED" LANDS FOR PURPOSES OF TRIBAL TREATY HUNTING RIGHTS.

A. The status of tribal treaty hunting rights on National Forest lands is an important question of Federal law affecting not only *amicus*, but also numerous other tribes.

1. At least nineteen tribes, in at least a dozen treaties, reserved for themselves the right to hunt on Federal lands away from their respective reservations. In the 1868 Treaty, the Tribe reserved its right to hunt on "unoccupied lands of the United States." 15 Stat. at 650 art. IV. The same year, the Navajo and the Shoshonee[5] and Bannock Tribes also reserved

[5] In the interest of clarity, this Brief, when referring to a treaty, spells the names of the tribes party to that treaty the way they appear in the treaty.

off-reservation hunting rights on "unoccupied" Federal lands.[6] Similarly, the Walla-Walla, Cayuses, and Umatilla Tribes reserved their right to hunt on "unclaimed lands."[7] And at least a dozen tribes in eight different treaties reserved for their members the right to hunt on "open and unclaimed land[s]."[8] All of these treaties – particularly those of tribes who hunt on National Forest lands located within the federal Tenth Circuit – are implicated by the decision below.

2. Most, if not all, of the aforementioned tribes are located near, if not adjacent to, National Forest lands. In addition, scores of other tribes throughout the

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[6] Treaty between the United States of America and the Navajo Tribe of Indians, 15 Stat. 667, 670 art. IX (1868); Treaty between the United States of America and the Eastern Band of Shoshonees and the Bannock Tribe of Indians, 15 Stat. 673, 674-75 art. IV (1868).

[7] Treaty between the United States and the Walla-Walla, Cayuses, and Umatilla Tribes and Bands of Indians in Washington and Oregon Territories, 12 Stat. 945, 946 art. I (1855).

[8] Treaty with Nisquallys, &c, 10 Stat. 1132, 1133 art. III (1854); Treaty between the United States and the Duwamish, Suquamish, and other allied and subordinate Tribes of Indians in Washington Territory, 12 Stat. 927, 928 art. V (1855); Treaty between the United States of America and the S'Klallams Indians, 12 Stat. 933, 934 art. IV (1855); Treaty between the United States of America and the Makah Tribe of Indians, 12 Stat. 939, 940 art. IV (1855); Treaty between the United States and the Yakama Nation of Indians, 12 Stat. 951, 952 art. III (1855); Treaty between the United States of America and the Nez Percé Indians, 12 Stat. 957, 958 art. III (1855); Treaty between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, 12 Stat. 975, 976 art. III (1855) (hereinafter "Treaty of Hell Gate"); Treaty between the United States and the Qui-nai-elt and Quil-leh-ute Indians, 12 Stat. 971, 972 art. III (1856).

United States with treaty-guaranteed off-reservation hunting rights are located near or adjacent to National Forest lands within which they reserved rights to hunt, fish, or otherwise gather resources needed for the subsistence of those tribes or their members. In each of those instances, the status of treaty hunting rights on those lands is a purely Federal question, the answer to which should not vary from state to state. Consequently, certiorari is warranted and necessary to resolve this important question.

B. The decision below exacerbates an untenable split in authority on this important question of Federal law.[9]

Amicus is uniquely positioned to feel the effects of the split in authority between the Ninth and Tenth Circuits noted below, and the disagreement between the Wyoming decision here and the contrary decisions by State courts of last resort in Montana, Idaho, and

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[9] Petitioner ably demonstrates this disagreement between the Wyoming decision below on the one hand, and Idaho (*State v. Tinno*, 249 P.2d 1386, 1389-90 (Idaho 1972); *State v. Arthur*, 261 P.2d 135, 141 (Idaho 1953)), Montana (*State v. Stasso*, 563 P.2d 562, 565 (Montana 1977)), and Washington (*State v. Buchanan*, 978 P.2d 1070, 1081 (Wash. 1999) (citing *State v. Miller*, 689 P.2d 81, 82 n.2 (Wash. 1984)) on the other, and between the Tenth and Ninth Circuits represented by *Repsis* and, *inter alia*, *Swim v. Bergland*, 696 F.2d 712, 714 (9th Cir. 1983). Pet.24-27. In the interest of brevity, *amicus* will not repeat that argument here. However, because its Reservation is adjacent to two National Forests in states that are on opposite sides of this disagreement, *amicus* is uniquely positioned to demonstrate the practical effects of the dispute.

Washington on the question of whether National Forest lands constitute "unoccupied lands of the United States" upon which the Tribe and its members may exercise off-reservation hunting rights. As a result of this split, the Tribe's members are subject to criminal penalties for engaging in treaty-guaranteed off-reservation hunting in one state, despite the same hunting being sanctioned by another. That also makes this case an especially appropriate vehicle to resolve an issue of importance not only to *amicus*, but to numerous other tribes similarly situated.

1. The western portion of the Reservation shares a long border with the Custer Gallatin National Forest in Montana, where the Montana Supreme Court (in interpreting another tribe's treaty) held that tribes whose treaties provide for off-reservation hunting rights may exercise those rights on National Forest lands. *See generally Stasso*, 563 P.2d 562. The Confederated Salish and Kootenai Tribes ("CSKT") reserved for their members, *inter alia*, "the privilege of hunting . . . upon open and unclaimed land." *Id.* at 563-64 (quoting Treaty of Hell Gate). In *Stasso*, a CSKT member shot and killed a deer within National Forest lands outside the Flathead Reservation and was convicted of killing a deer out of season. *Id.* at 562-63. The *Stasso* court concluded that "the National Forest lands herein are open and unclaimed lands" available for off-reservation treaty hunting. *Id.* at 565. Presumably Montana, which is in the Ninth Circuit, would uphold under its own precedent and that of the Ninth Circuit the treaty-guaranteed right of the Crow Tribe's

members to hunt on the "unoccupied lands of the United States" that make up the Custer Gallatin National Forest.

2. The south-central portion of the Tribe's Reservation, however, borders the Bighorn National Forest in Wyoming, where the decision below and *Repsis* put the Tribe's members in criminal jeopardy if they exercise their hunting rights in that National Forest created from their ceded lands. Consequently, two members of the Tribe who follow game across the Reservation borders into different National Forests would find themselves governed by vastly different legal schemes purely as a matter of differing state understanding and enforcement of Federal law, including a split in authority between two different Federal circuits. One who follows prey into the Custer Gallatin National Forest may take game for sustenance; however, one who follows prey into the Bighorn National Forest is subject to arrest and prosecution for doing the same, despite the fact that both hunters share the same treaty rights, and both are hunting on Federal lands that share the same legal status as National Forests created from the Tribe's ceded lands.

3. Neither the text of the Tribe's treaties, nor of the statutes creating the National Forests, nor the decision below, suggests any reason to believe that Congress intended to rely on state law to determine the scope of off-reservation hunting rights on Federal lands. *Cf. Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 44 (1989) ("the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term").

Only this Court can resolve this split; therefore, certiorari is necessary.

II. THE DECISION BELOW CONFLICTS WITH A LONG LINE OF THIS COURT'S DECISIONS ON TWO IMPORTANT QUESTIONS OF FEDERAL LAW: UNDER WHAT CONDITIONS ARE INDIAN TREATY RIGHTS ABROGATED, AND WHAT PRINCIPLES GOVERN THE INTERPRETATION OF INDIAN TREATIES.

This Court most recently considered the question of tribal treaty hunting rights in *Mille Lacs*. 526 U.S. 172 (1999). Unfortunately, the decision below ignores several of the key holdings of *Mille Lacs*, as well as a long line of other cases decided by this Court.

A. Congress has never expressed an intent to abrogate the Tribe's off-reservation treaty hunting rights; to the contrary, it has reaffirmed them in multiple statutes.

1. There is no question that the Tribe, in both the 1851 Treaty and the 1868 Treaty, reserved the inherent right of its members to hunt on lands outside the Reservation. 1851 Treaty, 11 Stat. 749 and 2 C. Kappler 594; 1868 Treaty, 15 Stat. 649; *see also United States v. Winans*, 198 U.S. 371 (1905) (affirming tribe's right, reserved by treaty, to fish off of its reservation). The right retained in the 1851 Treaty was sweeping: the Tribe (and other signatory tribes) "do not

surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." 11 Stat. 749 and 2 C. Kappler at 595 art. 5 (1904); *Montana v. United States*, 450 U.S. 544, 548. The 1868 Treaty provides that the Tribe's members "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 15 Stat. at 650 art. IV.

2. Congress must clearly express its intent to abrogate a treaty right. *Mille Lacs*, 526 U.S. at 202; *see also United States v. Dion*, 476 U.S. 734, 738 (1986) ("We have required that Congress' intention to abrogate Indian treaty rights be clear and plain."); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights."); *cf. Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968) ("While the power to abrogate [hunting and fishing] rights exists, the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress" (internal quotation and citations omitted).).[10] Moreover, "[t]here must be

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[10] Although each of the preceding cases concerned tribal hunting and fishing rights, this Court has applied this "clear intent" standard to any number of contexts, including reservation diminishment, *Nebraska v. Parker*, 136 S. Ct. 1072, 1078-79 (2017) ("Only Congress can divest a reservation of its land and diminish its boundaries, and its intent to do so must be clear" (internal quotation and citation omitted).); *Solem v. Bartlett*, 465 U.S. 463, 470

'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.'" *Mille Lacs*, 526 U.S. at 202-03 (quoting *Dion*, 476 U.S. at 740).[11]

3. The decision below fails to identify any statute containing the requisite "clear[] express[ion]" of Congress to abrogate the Tribe's off-reservation hunting right. It merely cites *Repsis* for the proposition that the Tribe's off-reservation hunting right "was repealed by the act of admitting Wyoming into the Union," App.22 (quoting *Repsis*, 73 F.3d at 992). *Repsis*, in turn, identified no provision of the act admitting Wyoming

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(1984) ("Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."); and tribal sovereign immunity, *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2031 (2014) ("'To abrogate [tribal] immunity, Congress must 'unequivocally' express that purpose'" (quoting *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quoting, in turn, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978))).)

[11] The cases cited are consistent with current international legal standards on indigenous peoples' rights, including treaty rights. *See, e.g.*, U.N. Decl. on the Rights of Indigenous Peoples, art. 26.3 (states are to recognize, respect, and protect indigenous rights to lands, territories, and resources traditionally owned, occupied, or otherwise used or acquired by indigenous peoples), art.46.2 (rights of indigenous peoples are not lightly to be limited). The United States has stated its support for these standards. *See* Announcement of United States Support for the United Nations Declaration on the Rights of Indigenous Peoples, http://www.achp.gov/docs/US%20Support%20for%20Declaration%2012-10.pd0.

in which Congress "clearly expressed its intent" to abrogate the Tribe's off-reservation hunting right, but instead relied only upon this Court's decision in *Race Horse*, 163 U.S. 504, that the equal footing doctrine created an "irreconcilable" conflict between a tribe's off-reservation hunting right and the "power of a State to control and regulate the taking of game." *Repsis*, 73 F.3d at 990 (quoting *Race Horse*, 163 U.S. at 507, 514). In *Mille Lacs*, this court expressly repudiated that aspect of *Race Horse* (and, necessarily, of *Repsis* as well):

> But *Race Horse* rested on a false premise. As this Court's subsequent cases have made clear, an Indian tribe's rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources in the State. Rather, Indian treaty rights can coexist with state management of natural resources.

Mille Lacs, 526 U.S. at 204 (internal citations omitted), *see also Buchanan*, 978 P.2d at 1082-83 (noting the reliance of *Repsis* on *Race Horse*, and that "the United States Supreme Court effectively overruled *Race Horse* in [*Mille Lacs*]"). The decision below, notwithstanding this Court's intervening decision in *Mille Lacs*, held that Petitioner had no right to challenge the holding in *Repsis* "even if that determination was based on an erroneous application of the law." App.24.

In fact, Congress has never "clearly expresse[d] its intent" to abrogate the Tribe's off-reservation hunting right. The act admitting Wyoming to the Union did not do so. *See generally* An act to provide for the admission

of the State of Wyoming into the Union, and for other purposes, 26 Stat. 222 (1890).[12]

On the contrary, in the years following the admission of Wyoming to the Union, Congress expressly reaffirmed that the Tribe's treaties continued in full force and effect. Some eight months after Wyoming was admitted to the Union, in a negotiated agreement enacted as part of an Indian appropriations act, Congress expressly provided that "all existing provisions" of the 1868 Treaty "shall continue in force." 26 Stat. at 1042 (1891). That same day, Congress also enacted the Forest Reserve Act, which both authorized the Executive to create National Forests and expressly provided "[t]hat nothing in this act shall change, repeal or modify any agreements or treaties made with any Indian tribes for the disposal of their lands, or of land ceded to the United States to be disposed of for the benefit of such tribes. . . ." An act to repeal timber culture laws, and for other purposes, 26 Stat. 1095, 1099 sec. 10 (1891).[13] Finally, another negotiated agreement enacted by Congress in 1904 provided that "existing provisions of all former treaties with the Crow tribe [sic] of Indians not inconsistent with the provisions of this agreement are hereby continued in force and effect."

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[12] Nor did President Cleveland's proclamation creating the Bighorn National Forest. *See generally* A Proclamation by the President of the United States of America, 29 Stat. 909 (1897). Moreover, as Petitioner demonstrates, the President could not have abrogated the Tribe's treaty rights unless expressly authorized to do so by Congress, which he was not. Pet.22-23.

[13] Section 10 contains an exception that is not relevant to this matter.

An act to ratify and amend an agreement with the Indians of the Crow Reservation in Montana, and making appropriations to carry the same into effect, 33 Stat. 352, 355 (1904).[14]

Certiorari is necessary to remedy the failure of the decision below to follow this Court's clear requirements for finding abrogation of a tribe's treaty-reserved right.

B. The decision below failed to interpret the 1868 Treaty as the Tribe would have understood it, as required by this Court.

1. A guiding principle of this Court's Indian law jurisprudence is that "we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them." *Mille Lacs*, 526 U.S. at 196 (citing *Washington State Commercial Passenger*

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[14] Similarly, neither the decision below, nor the opinion in *Repsis* upon which the decision below relied, identifies any statute "clearly expressing [Congress's] intent" to remove the Big Horn National Forest from the category of "unoccupied lands of the United States." Although the *Repsis* court noted that "Congress created the Big Horn National Forest and expressly mandated that the national forest lands be managed and regulated for the specific purposes of improving and protecting the forest, securing favorable water flows, and furnishing a continuous supply of timber," 73 F.3d at 993 (citing 16 U.S.C. § 475), it identified no evidence that Congress considered the conflict between these purposes and the Tribe's exercise of its treaty rights and resolved the conflict by abrogating the treaty, as required by *Mille Lacs*. 526 U.S. at 202-03. As Petitioner demonstrates, the creation of the Big Horn National Forest did not, in fact, abrogate the Tribe's off-reservation hunting right on those lands. Pet.21-24.

Fishing Vessel Ass'n, 443 U.S. at 675-76; *Winans*, 198 U.S. at 380-81); *see also United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938) (treaties "are not to be interpreted narrowly, . . . but are to be construed in the sense in which naturally the Indians would understand them"); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551-54 (1832) (interpreting treaty as the Cherokee would have understood its meaning).

2. Neither the decision below, nor the *Repsis* decision upon which it relies, contains any indication that the Tribe, when it entered the 1868 Treaty, understood that that treaty "clearly contemplated" the expiration of the off-reservation hunting right upon Wyoming's admission to the Union. The decision below merely (and erroneously) concludes that *Repsis* remains good law, notwithstanding this Court's intervening decision in *Mille Lacs*. App.24 ("*Mille Lacs* did not overturn *Race Horse* or *Repsis*. Rather, it affirmed the concept that a court interpreting a treaty must determine if the rights reserved in the treaty were intended to be perpetual or if they were intended to expire upon the happening of a 'clearly contemplated event'" (footnote omitted).); *id.* at 24 n.6 ("the *Mille Lacs* Court held that courts should look to see whether the rights granted in a treaty were intended to terminate upon the happening of a clearly contemplated event, as the *Race Horse* court had done.").

The *Repsis* court acknowledged its obligation to interpret the 1868 Treaty as the Tribe would have understood it. 73 F.3d at 992 (collecting cases). Nevertheless, *Repsis* concluded that Wyoming's statehood

constituted the "clearly contemplated event" that terminated the Tribe's treaty-guaranteed off-reservation hunting right, while pointing to no evidence whatsoever that the Tribe understood that its hunting right would terminate upon statehood (of Wyoming or any other state). *See generally id.* In the alternative, the *Repsis* court concluded that the creation of the Bighorn National Forest rendered the lands contained therein no longer "unoccupied" and, therefore, extinguished the Tribe's treaty-guaranteed off-reservation hunting right on those lands. *Id.* at 986.

3. The historical record demonstrates, instead, that both the Tribe *and* the United States understood that the Tribe's members would be allowed to hunt on ceded lands so long as there was game to hunt and doing so would not interfere with non-Indian settlement. In welcoming the Tribe to the negotiations, Commissioner Taylor told the Tribe's representatives that the United States hoped to settle most of the Tribe's territory, but that the Tribe nonetheless would retain "the right to hunt upon it as long as the game lasts." *Proceedings* at 86. In response, all three of the Tribe's representatives emphasized the importance of hunting to the Tribe's way of life. *Id.* at 88-89. The following day, Commissioner Taylor reassured the Tribe's representatives that even upon accepting a reservation, "[y]ou will still be free to hunt as you are now." *Id.* at 90. Thus, both the Tribe and the United States understood that the Tribe, even if it accepted a reservation, intended to preserve its right to hunt throughout its territory.

Ultimately, the 1868 Treaty provided that the Tribe's members could continue to hunt "on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 1868 Treaty, 15 Stat. at 650 art. IV. The natural reading of this provision is that the Tribe's members could continue to hunt away from the Reservation "as long as these trips did not interfere with non-Indian settlement." Hoxie, *The Crow* at 72. That also was the United States' contemporaneous understanding, as demonstrated by Sen. James Harlan's explanation on the floor of the Senate:

> There is, I think, in the same treaty, a provision permitting these Indians to hunt, so long as they can do so without interfering with the settlements. So long as outside lands, outside of the reservation, may not be occupied by settlements, and may be occupied by game, they may hunt the game.

Cong. Globe, 40th Cong., 3d Sess. 1348, col. 3 (Feb. 18, 1869); *see also State v. Cutler*, 708 P.2d 853, 863 (Idaho 1985) (quoting Sen. Harlan).

4. The 1868 Treaty provides that the Tribe's off-reservation hunting right persists so long as three conditions are met: (1) the United States retains unoccupied lands; (2) game may be found on those lands; and (3) there is peace between the United States and the Tribe. 1868 Treaty, 15 Stat. at 650 art. IV.

Each of those conditions continues to this day. (1) The United States maintains unoccupied lands, including the Bighorn National Forest, *see* Pet. 21-24, within the territory ceded by the Tribe. (2) Game is found on those lands – as demonstrated by the fact that Petitioner took three elk on those lands. Respondent's own Game & Fish Department reports that elk are abundant in the region.[15] Finally, there has been peace between the United States and the Tribe since the 1868 Treaty was executed.[16]

5. The decision below made no examination of these express conditions in the 1868 Treaty which continue to this day, and instead – contrary to this Court's direction in cases dating back almost 200 years – concluded without any evidence that the treaty "clearly contemplated" that the Tribe's treaty-guaranteed

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[15] Wyoming Game & Fish Dep't, Wyoming Statewide Hunting Season Forecast (rev. Sept. 12, 2017), *available at* https://wgfd.wyo.gov/Hunting/Wyoming-Hunting-Forecast (last visited Oct. 27, 2017) (elk populations in Sheridan Region, which encompasses Bighorn National Forest, "exceed[] management objectives").

[16] The Tribe allied with the United States against the Sioux, Cheyenne, and Arapaho in the 1870s. As the Crow Chief Plenty-Coups explained, the Tribe provided scouts for the United States at the Little Bighorn for the purpose of preserving peace with the United States and preserving their territorial rights: "Our decision was reached, not because we loved the white man who was already crowding other tribes into our country, or because we hated the Sioux, Cheyenne, and Arapahoe, but because we plainly saw that this course was the only one which might save our beautiful country for us." Frank B. Linderman, *Plenty-Coups: Chief of the Crows* 85 (new ed. 2002); *see also* Peter Nabokov, *Two Leggings: The Making of a Crow Warrior* 187 (1967) ("We helped the white man so we could own our land in peace.").

off-reservation hunting right would terminate. Certiorari is warranted, and necessary, to remedy these failures.

CONCLUSION

For the forgoing reasons, Your *Amicus* respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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